

These are the tentative rulings for civil law and motion matters set for Tuesday, July 26, 2011, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Monday, July 25, 2011. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MARGARET E. WELLS AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

1. M-CV-0049997 Deutsche Bank National Trust Co. vs. Morrow, Kim

Appearance required for hearing. Plaintiff's attorney may appear by telephone. The court will contact counsel when the matter is called for hearing.

Defendant's motion to set aside default and default judgment is denied. Defendant has not made a showing of mistake, inadvertence, surprise, or excusable neglect per CCP 473. The issues raised in the motion relate to possible wrongful conduct by parties other than plaintiff. Moreover, defendant has not offered any reason or excuse why she did not file an answer to the complaint.

2. S-CV-0023219 McGillicuddy, Jeffrey vs. R L W, Inc., et al

This tentative ruling is issued by the Honorable Charles D. Wachob. If oral argument is requested, oral argument will be heard at 8:30 a.m. on Tuesday, July 26, 2011, in Department 42 of the above-entitled court.

1. Motion of Defendants RLW, Inc. and Richard Wilson for Attorneys' Fees

Defendants RLW, Inc. and Richard Wilson move the court for an order requiring plaintiff to pay attorneys' fees under Code of Civil Procedure section 2033.420 as a result of plaintiff's denial of requests for admissions of fact. Defendants also seek fees on the basis of estoppel.

Request For Judicial Notice

The court will grant defendants' request to take judicial notice of the Complaint, First Amended Complaint and Tentative Decision in this case.

Objections to Koonce Declaration

Moving defendants' objections to the declaration of plaintiff's counsel Gregory Koonce are overruled. The plaintiff's responses to interrogatories are relevant to this motion in that they support plaintiff's denials of the requests for admissions of fact.

Ruling on Motion

The court will first consider defendants' request for an award of their costs of proof in this case. Code of Civil Procedure section 2033.420(a) provides "if a party fails to admit...the truth of any matter when requested to do so...and if the party requesting that admission thereafter proves the...truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees." However, an award of fees and costs is not automatic. The statute provides that "The court shall make this order unless it finds any of the following:...The party failing to make the admission had reasonable ground to believe that that party would prevail on the matter." (*Code of Civil Procedure section 2033.420(b)(3)*).

Plaintiff's denials to the requests for admissions of fact were not unreasonable at the time the denials were made. "If the responding party is found to have *unreasonably* denied an RFA, he or she may be ordered to pay the costs and fees incurred by the requesting party in proving that matter." (*Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2005)* ¶ 8:1404.) First, the requests for admissions of fact, and the subsequent denials, occurred early in the litigation, before more substantial discovery had occurred, and were reasonable. Second, in reviewing the requests for admissions, the court notes that, for the most part, the requests are very broad. Third, several of the responses contained objections and several of the responses were not outright denials. Fourth, more fundamentally, the court finds that plaintiff had reasonable grounds to believe that he would prevail on the matters that were the subjects of the requests. Many of the issues at trial called for the court to make credibility determinations, and were close calls. The awarding of costs of proof is improper if the party who denied the request for admission "held a reasonably entertained good faith belief [it] would prevail on the issue at trial." (*Miller v. American Greetings Corp. (2008) 161 Cal.App.4th 1055, 1066.*) Here, the court finds plaintiff reasonably entertained a good faith belief he would prevail on the issues at trial. For all of these reasons, defendants' request for an award of fees as a cost of proving the matters denied by plaintiff in his response to the requests for admissions is denied.

Next, defendants assert they are entitled to an award of attorneys' fees because plaintiff is estopped from arguing that Richard Wilson and his brokerage are not entitled to reasonable attorneys' fees. Defendants claim that plaintiff set forth a request for fees in the prayer to his complaint and, therefore, even though plaintiff was not a signatory to the contract, defendants believe plaintiff would have argued for an award of attorneys' fees. However, plaintiff's claim for attorneys' fees under the contract was directed to the other signatory to the contract, defendant seller Patrick. Defendants' reliance on *M. Perez Co., Inc. v. Base Camp Condominiums Ass'n No. One (2003) 111 Cal.App.4th 456* is misplaced. In short, plaintiff is not estopped from opposing the attorneys' fees and costs claimed by defendants RLW, Inc. and Richard Wilson.

For all of the reasons above, moving defendants' motion for attorneys' fees and costs is denied.

2. Plaintiff's Motion To Tax Costs

Plaintiff moves the court for an order taxing as costs the attorneys' fees claimed by defendants RLW, Inc. and Richard Wilson in their memorandum of costs. This motion represents the flipside of the motions discussed above. The motion is granted. Defendants'

claim for \$96,967 for attorneys' fees, as stated in Item 10 of defendants' supplemental memorandum of costs, is taxed.

3. Defendant Patrick's Motion For Attorneys' Fees

Defendant Patrick's motion for attorneys' fees is granted. The real estate purchase agreement contains an attorney fee provision. Fees may be awarded to the prevailing party under such circumstances. (*Civil Code sections 1717, 1032, and 1033.5.*) The fees claimed by defendant are reasonable in nature and amount. Defendant is entitled to an award of fees in the amount of \$102,734.35.

3. S-CV-0023333 Haight, Charles S. et al vs. Finley, Andrew R. et al

This tentative ruling is issued by the Honorable Colleen M. Nichols. If oral argument is requested, oral argument will be heard at 8:30 a.m. on Tuesday, July 26, 2011, in Department 32 of the above-entitled court.

The motion of plaintiffs and cross-defendants for an award of attorney's fees and costs is denied. First, the pleading and litigation did not reasonably alert the Hollands or Barretts that plaintiffs were seeking attorneys' fees. (*Rutherford v. Board of Trustees* (1974) 37b Cal.App.3d 75, 782.) The complaint does not mention fees, and the prayer does not request them. Second, the court finds that the action is not primarily one to recover damages for trespass to property. CCP 1021.9. Rather, it was an action to quiet title and trespass. In addition, the disputed land (a paved driveway) is neither under cultivation nor intended or used for the raising of livestock presently, and there is no evidence the Pruetts intend to use this land for those purposes in the future. (Cf. *Kelly v. CB & I Construction, Inc.* (2007) 179 Cal.App.4th 442.) The case is also factually distinguishable from *Starrh & Starrah Cotton Growers v. Aera Energy LLC* (2007) 153 Cal.App.4th 583 which involved groundwater contamination under the entire property. Here, the paved road is a small, discrete part of the Pruetts' property. Finally, the court has discretion to disallow fees if the total damages are less than the maximum amount recoverable in a limited civil case (\$25,000). (*Haworth v. Lira* (1991) 232 Cal.App.3d 1362, 1371; CCP 1033(a). See also *Niederer v. Ferreira* (1987) 189 Cal.App.3d 1485, 1507-1508.) The court exercises its discretion in this case and denies the fee request because plaintiffs did not provide reasonable notice that they would be requesting fees, because the action is not primarily one to recover damages for trespass to property and because the total damages are less than the maximum amount recoverable in a limited civil case.

Plaintiffs' unopposed request for judicial notice of Placer County Code section 17.52.020 is granted. The court takes judicial notice of the Placer County Ordinance.

4. S-CV-0025503 Espinoza, Alejandro "Alex" v Squaw Creek Transp. Inc, et al

The motion to strike is continued, on the court's motion, to August 2, 2011, 8:30 a.m., in Department 42, to be heard by the Honorable Charles D. Wachob with the demurrer already scheduled for that date.

5. S-CV-0026233 PNC Bank, N.A. vs. Joseph, Martha F.

Defendant's motion to set aside ruling on the motion for summary judgment is denied.

First, insufficient notice of the motion was given. Per CCP 1005, the proper notice period is 16 court days plus 5 calendar days if the motion is served by mail. This motion was served by mail on July 5.

Secondly, the motion was not filed within a reasonable time. The court ruled on the motion for summary judgment on September 14, 2010. Defendant's attorney appeared at that time. Since then, there have been at least two other hearings (2/1/11 and 3/1/11) wherein defendant's attorney indicated that she was going to seek relief from the court's ruling. Yet this motion was not filed until July 5, 2011.

Finally, the provisions of CCP 473 are not applicable to rulings on motions for summary judgment. *English v. Ikon Business Solutions* (2006) 94 Cal. App. 4th 130; *Vandermoon v. Sanwong* (2006) 142 Cal. App. 4th 315.

6. S-CV-0026965 Bernardo, Bernie H. vs. In-N-Out Burger, Inc.

Appearance of petitioner and counsel required for hearing on petition to compromise minor's claim. Appearance of minor is not required.

7. S-CV-0027361 Rivera, Ferdinand, et al vs. Ndex West, LLC, et al

Defendant Wells Fargo Bank's demurrer to second amended complaint ("SAC") is sustained without leave to amend.

The first cause of action for violation of Civil Code §§ 2923.5 and 2924 fails to state a claim. The notice of default contains a declaration that moving defendant tried to contact the borrower. The notice of sale also contains the required declaration. Moreover, the FAC concedes that when plaintiffs first defaulted, they had discussions with moving defendant re assistance with the mortgage payments. In addition, these code sections apply only to "owner-occupied" residences, and judicially noticeable documents raise questions as to whether the property at issue was plaintiffs' residence. Moreover, plaintiffs have not alleged that they tendered, or had the ability to tender, the full amount of the debt. Abdallah v. United Savings Bank (1996) 43 Cal. App. 4th 1101.

The third cause of action for aiding and abetting fails to state a claim. Plaintiff alleges that moving defendant paid an "unearned and undisclosed" yield spread premium to the broker. Yield spread premiums are not illegal per se. Byars v. SCME Mortg. Bankers, (2003) 109 Cal.App.4th 1134, 1141. Plaintiffs have not alleged any facts that state that no services were performed for the compensation paid and that the services performed were not reasonably related to the value of the services performed. Moreover, to the extent that plaintiff is claiming a breach of fiduciary duty, a lender owes no fiduciary duty to a borrower. Wyatt v. Union Mortgage (1979) 24 Cal. 3d 773.

The fourth cause of action for violation of Civil Code §§ 1920 and 1921 fails to state a claim. The allegations of the FAC indicate that this cause of action is barred by the 3 year statute of limitations. CCP 340. The loan at issue was made in December 2005; the complaint in this action was filed on June 15, 2010. Insufficient facts are stated to support a claim for equitable

tolling. Moreover, claims for negligence per se must be stated with specificity. Covenant Care v. Superior Court (2004) 32 Cal. 4th 771.

The sixth cause of action for violation of Bus. & Prof. Code 17200 fails to state a claim. To state such a cause of action, plaintiff must allege an underlying violation of law. Farmers Ins. Exchange v. Superior Court (1992) 2 Cal. 4th 377. As indicated above, the negligence per se claims fail to state causes of action. Moreover, the FAC does not address the acts of each defendant, but rather refers to them collectively. Wells Fargo cannot be held responsible for the acts of other defendants. In addition, a plaintiff in a UCL claim must have suffered injury in fact and lost money or property. Such facts are not pled here; plaintiff borrowed money and has not paid it back. Finally, the allegations of the FAC indicate that this cause of action is barred by the 4 year statute of limitations. Bus. & Prof. Code 17208. The loan at issue was made in December 2005; the complaint in this action was filed on June 15, 2010. Insufficient facts are stated to support a claim for equitable tolling.

Defendant's request for judicial notice is granted.

In light of the ruling on the demurrer, the motion to strike is dropped as moot.

8. S-CV-0027999 Downard, Jerry A. vs. Western Pipeline, Inc.

The motion of Scott Bovee to withdraw as attorney of record for defendant Western Pipeline, Inc., is denied without prejudice. There is no proof of service of the motion on the client in the court's file.

9. S-CV-0028021 Bank of America, N.A. vs. Highlands Hotel Residences Co.

This motion to approve sale of receivership property was dropped by the moving party.

10. S-CV-0028027 Westwood Montserrat, Ltd. vs. AGK Sierra De Montserrat

The motion for summary judgment is dropped: no moving papers were filed.

11. S-CV-0028279 Props, Rick, et al vs. Wells Fargo Bank, N.A., et al

The demurrer to the first amended cross-complaint is continued, on the court's motion, to August 16, 2011, at 8:30 a.m., in Department 32, to be heard by the Hon. Colleen M. Nichols.

12. S-CV-0028347 Wells, Glen S. vs. Welco Engineering, Inc.

The scheduled matter is dropped for lack of moving papers.

13. S-CV-0028517 Richard, John J., et al vs. Horizon West Healthcare, et al

The motion for trial preference was dropped by the moving party.

14. S-CV-0028789 Gautam, Anish vs. Bank of America, N.A.

The demurrer and motion to strike are dropped: a full dismissal was filed.

15. S-CV-0028838 Symetra Assigned Benefits Service Co. vs. Cochran, Justin

The petition of Symetra Assigned Benefits Service Company for approval of transfer of structured settlement payment rights is granted.

16. S-CV-0028935 Pursuel Companies, Inc. vs. Westfield, LLC

Defendant's motion to strike punitive damages claims from the complaint is granted with leave to amend. The complaint does not state facts showing fraud, malice, or oppression per Civil Code 3294, nor does it state facts to show how the corporate defendant is liable for punitive damages.

Defendant's request for judicial notice is granted.

Any amended complaint shall be served and filed by August 19, 2011.

17. S-CV-0029053 Deaton, Tristan - In Re the Petition of

Appearance of petitioner and counsel required for hearing on petition to compromise minor's claim. Appearance of minor is not required.

18. S-CV-0029317 Frye, Jocelyn N. - In Re the Petition of

Appearance of petitioner, minor, and counsel required for hearing. The court notes that the only recent medical report indicates that the minor is not recovered from her injuries. Moreover, although the file indicates that \$7,875 will be paid to a guardian of the estate, there is no indication that such a guardianship has been established, nor the reason why part of the settlement funds will be paid to the guardian and part placed in a blocked account.

19. S-CV-0029371 Gingery, Richard D. Sr. et.al. vs. Aurora Loan Services LLC

Plaintiffs' application for preliminary injunction is denied. Plaintiffs have not shown the probability of success on the merits.

Defendants' request for judicial notice is granted. Those documents show that MERS was the beneficiary of the original deed of trust, that MERS transferred its beneficial interest to Aurora Loan Services, that Aurora as beneficiary substituted Quality Loan Service Corporation as trustee, and that Quality Loan Service properly recorded the notice of default.

Plaintiff's argument that MERS never owned the original promissory note is unavailing. MERS held the beneficial interest. *Gomes v. Countrywide* (2011) 192 Cal. App. 4th 1149. Non-judicial foreclosure is governed by CC 2924 et seq., not the Commercial Code. Civil Code §§2924 et seq. are comprehensive and exclusive. *Moeller v. Lien* (1994) 25 Cal. App. 4th 822. In addition, loan servicers are excluded from the scope of the FDCPA. *Bailey v. Sec. Nat'l Servicing Corp.* (7th Cir. 1998) 154 F. 3d 384.

20. S-CV-0029438 Funtax, Inc. vs. U.S. Bancorp

Plaintiff's application for writ of possession and preliminary injunction is denied.

Plaintiff has not demonstrated the probability of success on the merits. The account agreement specifically provides for the establishment of a reserve account to hold funds for 270 days to cover any charge backs, returns, adjustments, fees, fines, penalties, or other payments. Moreover, the temporary restraining order issued by the Sacramento County Superior Court in *People v. Roni Lynn Deutch* Case. No. 34-2011-00106554 prohibits the transfer of these funds. Finally, a writ of possession can be used only to recover property that exists in some concrete or tangible form, and is not appropriate for bank accounts. Weil & Brown, *Civil Procedure Before Trial*, §§9:786 et seq.

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